SARAWAK BUILDING SUPPLIES SDN BHD

v.

THE DIRECTOR OF FORESTS, FOREST DEPARTMENT HEADQUARTERS, KUCHING & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: KG 40 OF 1990]
14 MAY 1999

CIVIL PROCEDURE: *Interrogatories - Principles applicable - Whether interrogatories may be on a question of law or interpretation - Whether interrogatories may call for opinion on fact or law - Whether interrogatories questioning validity of another court's decision may be allowed - Whether interrogatories seeking to go to matters of evidence may be allowed - Object and purpose of payment in dispute - Whether interrogatories on object and purpose of payment would be oppressive*

CIVIL PROCEDURE: *Interrogatories - Application for leave to deliver - Pleadings closed - Whether application proper - Whether delay in making application must be explained - Rules of the High Court 1980, O. 26 r. 2*

The plaintiff commenced an action seeking certain declaratory reliefs as a result of the revocation of a forest timber licence. Prior to this action, a petition was filed by the plaintiff and other parties against certain respondents based on the same revocation of licence ('the petition'). The respondents to the petition were ordered to pay RM9,000,000 to one Huang Ee Hoe ('Huang'), a director of the plaintiff. In their re-amended defence to this action, the defendants contended that by virtue of the said payment, the plaintiff and/or Huang has received adequate compensation. In response, the plaintiff contended in its amended reply that the defendants were misrepresenting and distorting the purpose and object of the payment of the RM9,000,000 and that the said payment cannot benefit the defendants.

This was the defendants' application for interrogatories pursuant to O. 26 r. 2 of the Rules of the High Court 1980 ('the RHC') as to the purpose and object of the said payment. Although the pleadings in this case had closed some years ago, no explanation was given for the delay in making this application.

Held:

[1] The defendants cannot invoke O. 26 r. 2 of the RHC because the pleadings in this case had already closed. The fact that the pleadings were amended does not create a new period for close of pleadings. After the close of

pleadings, an application for interrogatories depends on the court's discretion. An explanation for the delay and the merits justifying the application ought to be given. An application for leave to administer interrogatories is one that requires the exercise of the discretion of the court. Under O. 26 r. 1(3) of the RHC, the court ought to grant leave either for disposing of the cause or matter fairly or for saving costs. Interrogatories must be shown to be necessary and it should not be used as a source of ammunition to be routinely discharged.

[2] Interrogatories would be limited to a question of fact and not law or interpretation. The assertion of the plaintiff that the RM9,000,000 cannot benefit the defendants is a question of law. Further, the purpose and object of payment would also be a question of interpreting the order made in the petition. An interrogatory should not call for an opinion on fact or law. The defendants had put in issue the validity of the order in the petition in these proceedings. This issue has to be decided. To ask what was the object and purpose of the payment is to seek the opinion of the plaintiff. It would be oppressive to allow such an interrogatory.

[3] Interrogatories that seek to go to matters of evidence like, for example, the identity of the witnesses or persons who paid and received are not allowed.

[4] The plaintiff had indicated that Huang would be called to give evidence at the trial as a principal witness of the plaintiff. Thus, the order for interrogatories does not save costs but adds to costs.

[5] The defendants are unsure of their position and are seeking information to decide whether they can rely on the payment of RM9,000,000. A court will not order interrogatories that are futile. It would be oppressive to ask the plaintiff to answer interrogatories on the object and purpose of the payment when the plaintiff is disputing the object and purpose of the payment as alleged by the defendants.

[Application dismissed.]

Case(s) referred to:

Attorney-General v. Wang New Zealand [1989] 2 PRNZ 238 ***(refd)***

Det Danske Hedeselskabet v. KDM International Plc [1994] 2 Lloyd's Law Reports 534 ***(refd)***

Eade & Anor v. Jacobs [1877] 3 Ex D 335 ***(refd)***

Hall v. Sevalco Ltd [1996] The Times Law Reports - 27 March ***(refd)***

Hoffman v. Postill [1869] LR 4 Ch App 673 ***(refd)***

Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors [1989] 3 MLJ 73 ***(refd)***

Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan [1980] 2 MLJ 19 ***(refd)***
Re Securitibank Ltd (No 32) [1984] 1 PRNZ 523 ***(refd)***
Rofe v. Kevorkian [1936] 3 All ER 1334 ***(refd)***
Shum Kai Cheong v. See Too Woon Yee [1998] 4 CLJ Supp 251 ***(refd)***
Westpac Baning Corporation v. Hart [1987] 1 PRNZ 719 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 26 rr. 1(3), 2

For the plaintiff - RR Sethu (George Lo & James Lo with him); M/s George Lo & Partners Advocs
For the defendants - Susan Gau; State Attorney General's Chambers

Reported by Anushana Balasubramaniam

JUDGMENT

Muhammad Kamil Awang J:

This is the defendants' application for interrogatories under O. 26 r. 2 of Rules of the High Court 1980. The defendant cannot invoke r. 2 because the pleadings in this case had closed two weeks after the filing of the reply on 4 May 1994. The fact that the pleadings were amended or reserved does not create a new period for close of pleadings. Therefore the request under r. 2 is misleading. After the close of the pleadings, it is a discretion which requires an explanation for the delay and the merits justifying the application. See *Shum Kai Cheong v. See Too Woon Yee* [1998] 4 CLJ Supp 251. There is no explanation given for the delay in making this application.

An application for leave to administer interrogatories is one that requires the exercise of the discretion of the court. See *Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan* [1980] 2 MLJ 19 (FC). Under O. 26 r. 1(3) rules of the High Court 1980 the purpose is:

(a) for disposing fairly the cause or matter; or

(b) for saving costs.

Interrogatories must be shown as necessary and it should not be used as a source of ammunition to be routinely discharge. See *Hall v. Sevalco Ltd* [1996] The Times Law Reports - 27 March which was approved by Colman J. in *Det Danske Hedeselskabet v. KDM International Plc* [1994] 2 Lloyd's Law Reports 534.

The interrogatories relate principally to what was pleaded in para. 7 of the Amended Reply of the plaintiff which reads:

7. With reference to paragraph 2F of the Re-Amended Defence the Plaintiff states that:

(a) the Defendants are misrepresenting and distorting the purpose and object of the payment of the said sum of RM9,000,000 to the said Huang Ee Hoe and

(b) the Defendants are not entitled to the benefit of, and/or cannot rely on, the said payment as a defence to the present claim.

Paragraph 1.2 of the re-amended statement of claim states:

1.2 By the said Order the present action was preserved and the cause of action of the Company in this suit was vested in Huang Ee Hoe, a shareholder of the Plaintiff. Due notice of the assignment was given by the Plaintiff by the notice dated 20 March 98 addressed to the Defendents."

Paragraph 2F of the Re-Amended Defence reads as follows:

2F(i) If (which is denied), the said assignment of the Plaintiff-Company's cause of action is valid and effective and/or this Suit could be prosecuted in the name of the Plaintiff-Company solely for the benefit of Huang, the Defendants will say -

(a) for the settlement of the said Petition, Huang and/or those whom he represents, was paid a sum of RM9,000,000 in Singapore by 1st - 9th Respondents to the said Petition;

(b) Huang and the other Petitioners in the said Petition had alleged, *inter-alia,* that the 1st - 9th Respondents therein were in breach of their fiduciary and other duties, by becoming, through one of their companies, Twinfield Sdn. Bhd., a contractor of the new Licence for the area formerly licensed under the said License, and continued to extract and harvest timber from the said forest area after the revocation of the said Licence;

(c) the said Petition included a prayer for damages for breach of fiduciary duties.

(ii) As the said Court Order was made after the payment of the sum of RM9,000,000 in Singapore to Huang and/or one of his solicitors, (who were both in Singapore at the material time), the Defendants will say that whatever damages that Huang may have sustained personally (which is denied) as a result of the revocation of the said License have been duly compensated.

The interrogatories also concerns para. 11.2(b) and (c) of the Re-Amended Defence which reads:

(b) In the alternative, the Defendants will say that the Plaintiff and/or Huang using the name of the Plaintiff-Company to continue this action has not suffered any loss or damage and if (which is denied) such loss or damage was suffered, the Plaintiff and/or Huang has received adequate compensation therefor.

(c) The Defendants further say that by the attempted concealment by Huang of the payment of the sum of RM9,000,000, the Court in the exercise of its discretion ought not to grant to Huang or the Plaintiff-Company, the declaratory reliefs sought herein.

Based upon the pleadings above mentioned, the plaintiff submitted that it is not disputed by the plaintiff that a sum of RM9,000,000 was received by Huang Ee Hoe, on whose benefit this Suit is now prosecuted in the name of the plaintiff. The plaintiff's amended reply does not dispute the fact that the payment was in connection with another matter which concerns the same subject matter (*ie*, revocation of Forest Timber License T/3019)

The pertinent issue is what was the compensation or damages from 1st - 9th respondents in another case, to Huang Ee Hoe for breach of fiduciary duties by the said respondents suffered by Huang Ee Hoe after the revocation of Forests Timber Licence No. T/3019 (which is the subject matter of this suit) when the said respondents used their company, Twinfield Sdn Bhd, to extract and take away timber from the forest area under the said Forest Timber Licence T/3019. If the Licence has not been revoked by the defendants, the plaintiff or Huang would have benefited by extracting or taking away the same timber resources which were extracted by Twinfield Sdn Bhd. Huang, on the other hand, says "the defendants are misrepresenting and distorting the purpose and object of the payment of the said sum of RM9,000,000 to the said Huang Ee Hoe." If what the defendants pleaded were misrepresentation or distortions as pleaded by the plaintiff, then it must be within the knowledge of Huang Ee Hoe as to what was the real purpose of the payment of that huge amount of RM9,000,000 to him.

The issues raised by the parties are:

(a) What was the real purpose of the payment of RM9,000,000 to Huang Ee Hoe?

(b) Was there a concealment of the payment of RM9,000,000 so that Huang Ee Hoe could still pursue this action and claim compensation from the defendants for any loss or damage allegedly sustained by him after the revocation of Forest Timber Licence T/3019?

The plaintiff's objections to the interrogatories are set out in the affidavit of Huang Ee Hoe affirmed on 11 August 1998. They are:

(a) Huang Ee Hoe has ceased to be a director of the plaintiff company because the company is subject to a winding-up order and a liquidator has been appointed.

(b) The defendants cannot seek to cross-examine by interrogatories.

Law

Any interrogatories would be limited to a question of fact and not law or interpretation. See *Hoffman v. Postill* [1869] LR 4 Ch App 673.

The plaintiff has clearly asserted in para. 7 of the amended reply that the RM9,000,000 cannot benefit the defendants. This is a question of law.

Further, the purpose and object of payment would also be a question of interpretation of order in Petition No. 1 of 1991. An interrogatory should not call for an opinion on fact or law. See *Re Securitibank Ltd (No. 32)* [1984] 1 PRNZ 523.

The defendants had put in issue the validity of the order in Petition No. 1 of 1991 in these proceedings. This issue had to be decided. To ask what was the "object and purpose" of the payment is to seek the opinion of the plaintiff. It is oppressive to allow such an interrogatory. See *Attorney-General v. Wang New Zealand* Ltd [1989] 2 PRNZ 238 (CA).

Such interrogatories which sought to go to matters of evidence *eg*, the identity of the witnesses or persons who paid and received, are not allowed. See *Eade & Another v. Jacobs* [1877] 3 Ex D 335 (CA).

The plaintiff had indicated that Huang Ee Hoe would be called to give evidence at the trial as a principal witness of the plaintiff. In my view, the order for interrogatories does not save costs, but adds to costs. See *Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors* [1989] 3 MLJ 73 affirmed on appeal in [1992] 2 SLR 710 (CA).

A party cannot make an assertive assertion unless it has evidence. The defendants' first affidavit does not state that it has the evidence and is seeking admission of that evidence in its possession. The defendants are unsure of their position and are seeking information to decide whether they can rely on the payment of RM9,000,000. In *Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan (supra),* the reason that the plaintiff failed in the Federal Court is on identity of the persons to whom the defendant has published the libel.

A court would not order interrogatories that are futile. See *Rofe v. Kevorkian* [1936] 3 All ER 1334. The plaintiff is disputing the defendants' contention that the payment of RM9,000,000 in Petition No. 1 of 1991 was the settlement

of the present claim is contrary to the terms of reliefs in the said petition. What purpose would be served in ordering interrogatories as to the "purpose and object of the payment"? It is oppressive to ask the plaintiff to answer interrogatories on object and purpose of the payment as the plaintiff is disputing what the defendants alleged was the purpose. See *Westpac Banking Corporation v. Hart* [1987] 1 PRNZ 719.

For the above reasons, I would not allow the application. The application is dismissed with costs.